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Supreme Court, U.S.
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No. 06-763

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

MILTON MCDANIEL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITIONER'S REPLY MEMORANDUM	1
I. THE DECISION BELOW CONFLICTS WITH *CALLEN*	3
II. THE DECISION BELOW CONFLICTS WITH THE 3RD AND 11TH CIRCUITS' DECISIONS	6
III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND THIS CASE, ALONG WITH *ACUFF*, ARE SUITABLE VEHICLES FOR RESOLVING THEM	8

TABLE OF AUTHORITIES

CASES Page

Anderson v. A.C. & S., Inc., 797 N.E.2d 537 (Ohio Ct. App. 2003), *appeal not allowed*, 804 N.E.2d 40 (Ohio 2004), *cert. denied*, 543 U.S. 926 (2004) 10

Babbitt v. Norfolk & W. Ry., 104 F.3d 89 (6th Cir. 1997) ..... *passim*

Callen v. Pennsylvania R.R., 332 U.S. 625 (1948) ..... *passim*

Coppage v. Kansas, 236 U.S. 1 (1915) 6

Employers' Liability Cases, 207 U.S. 463 (1908) ... 5

Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) 10

Philadelphia, B. & Wash. R.R. v. Schubert, 224 U.S. 603 (1912) 5

Sea-Land Serv., Inc. v. Sellan, 231 F.3d 848 (11th Cir. 2000) 2, 7, 10

Second Employers' Liability Cases, 223 U.S. 1 (1912) 5

Wicker v. Consol. Rail Corp., 142 F.3d 690 (3d Cir. 1998) ..... *passim*

STATUTES

Federal Employers' Liability Act, ch. 14, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 *et seq.*) ..... *passim*

LEGISLATIVE HISTORY

H.R. Rep. No. 60-1386 (1908) 4

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (2d ed. 1910) 4

TABLE OF AUTHORITIES—Continued

Page

Epstein, *Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire*, in THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed. 1999)..... 6

Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909)..... 6

PETITIONER'S REPLY MEMORANDUM

Respondent accepts that *Callen v. Pennsylvania Railroad*, 332 U.S. 625 (1948), held that settlement releases of Federal Employers' Liability Act (FELA) claims "stand on the same basis as the releases of others." *Id.* at 630; Opp. at 10. That basis was the general principle of freedom of contract. Unless a settlement is a sham or violates enacted public policy, parties may strike a deal on narrow or broad terms, limited to known events or allocating the risk of uncertainties, and a contract embodying that deal will be enforced.

Respondent seeks to read *Callen* narrowly, as validating only settlement releases of specific claims that are "in 'controversy,'" Opp. at 10, *i.e.*, ripe, and for "known" injuries, Opp. at i, 5-6. But *Callen* is not so limited, factually or legally. The release validated there precluded subsequent claims from the accident that had been the origin and focus of the settlement negotiations. However, the fact of an injury was "known," but its extent was not: as of the release it was understood to be a mere "weakness," 332 U.S. at 627; plaintiff later alleged it was "a severe and permanent back injury," *id.* at 626. *Callen*, and the freedom of contract principles underlying it, are not limited to a known controversy. Moreover, notwithstanding ***factual*** differences, the opinion below is irreconcilable with *Callen*'s ***legal interpretation*** of § 5.

Respondent also accepts that the opinion below addresses a "disagreement" among federal courts of appeal that has existed since 1998. Opp. at 7 (discussing *Babbitt v. Norfolk & W. Ry.*, 104 F.3d 89 (6th Cir. 1997), and *Wicker v. Consol. Rail Corp.*, 142 F.3d 690 (3d Cir. 1998)). *Babbitt* adopted a "known ***injury***" standard, which respondent appears to join the Mississippi Supreme Court in endorsing. *See* Pet. App. 16a, ¶ 31 ("applying" *Babbitt*); Opp. at i (court below "correctly held" that broad general release does not bar later FELA claim based on "injury unknown" when release signed

and "unrelated" to settled claim). The Third Circuit and the Eleventh Circuit have expressly rejected that standard, instead adopting a "known ***risk***" standard. *See Wicker*, 142 F.3d at 701; *Sea-Land Serv., Inc. v. Sellan*, 231 F.3d 848, 852 (11th Cir. 2000). That majority position is irreconcilable with respondent's proposed "in 'controversy'" limitation to *Callen*, Opp. at 10, since a mere "known ***risk***," as opposed to a "known ***injury***," does not typically create an Article III "controversy."

Respondent argues that the decision below is consistent with the "known risk" majority standard. Opp. at 5-7. But he cannot deny that the Third and Eleventh Circuits, in *Wicker* and *Sea-Land*, interpreted § 5 as leaving in place the general validity of settlement releases of "known risks," regardless of whether they entailed or had matured into "known injuries," "known claims," or ripe "controversies" as of the settlement. And, he does not and cannot deny that, when he signed the release here, work-related injury from exposure to asbestos was a "known risk" to him. He had been x-rayed for that risk a month earlier, and had discussed "asbestos claims that might later accrue" while negotiating the release, Opp. at 1-2.[1]

Respondent could not prevail under the "known risk" standard stated in *Sea-Land* and *Wicker*, just as he could not prevail under the normal principles of freedom of contract that govern FELA releases according to *Callen*. Only if § 5

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[1] There is an unresolved factual dispute as to what was said (as opposed to written in the contract) about how the release might affect those potential claims. *See* note 7, *infra*. Respondent ignores the important factual points in the text in asserting that the court below made a "finding" that "there was no evidence that Mr. McDaniel was aware that he had a potential asbestos-related ***injury***." Opp. at 6 n.1 (emphasis added). As Section II explains below, that appellate court statement was not a factual "finding," and was addressed to the "known injury" standard, not the "known risk" standard. Respondent plainly knew he was at risk of the asbestos-related injuries for which he had just been x-rayed, and which he raised as an issue in the negotiations.

imposes a further limitation on the freedom of contract—by confining releases under FELA to claims already "in 'controversy,'" Opp. at 10, or to "known injuries," *id.* at i, 5-6, or by prohibiting all "broad releases," *id.* at 8—is the decision below correct. No such limitations appear in § 5, or in *Callen*. The arguments for such extra limitations are properly addressed to the merits (or Congress), but afford no reason for denying review.

Respondent also asserts that the acknowledged circuit split "affects few cases." Opp. at 7-9. He focuses solely on appellate decisions, and ignores the reality that appellate decisions are just the tip of the iceberg, especially on issues of contract law. Most FELA claims are settled. As the precedents reflect, a great many of those settlements involve what respondent calls "broad general release[s]." Opp. at 8 n.3. If respondent and the court below are correct in their interpretation of § 5, those multiple-risk releases, which are a significant part of the consideration for which railroads make payments in many settlements every year, may not be worth the paper they are written on. The questions presented are important. Whatever their resolution, employers and employees need a clear statement of the federal law that determines the validity of the deals they have made or will make.

I. THE DECISION BELOW CONFLICTS WITH *CALLEN*

Respondent attempts to distinguish *Callen* as involving a single injury. As such, he insists, the injury at issue was already "known" and "in 'controversy'" when Mr. Callen signed his release. Opp. at 10. While the fact of the event causing Mr. Callen's injury was known when he signed his release, its severity and permanence were not. Anyway, nothing that this Court wrote in *Callen*, and nothing that Congress wrote in § 5 of FELA, prohibiting only "exemptions," distinguishes between old and new injuries, between known and unknown or uncertain injuries, or between injuries that

were "in 'controversy'" and those that were not when the release was signed.

Under respondent's view, there could be no valid release of any claim that was not already "in 'controversy,'" *i.e.*, accrued and known, at the time of the release. *See* Opp. at 10. Thus, § 5 would disable the parties from agreeing on compensation for even a known risk of an occupational injury or disease, even if the event, circumstance, or exposure (to a substance or environment) giving rise to the risk had already occurred.

Neither this Court nor Congress has announced such an extraordinary curtailment of the freedom of contract. In enacting § 5 of FELA in 1908, Congress did not distinguish among single injury, recurring injury, multiple injury, or other categories of cases. It only proscribed provisions meant to "exempt" the carrier "from any liability created by [the Act]." "Exemption" denotes a prospective "freedom from" or "immunity from" a law otherwise imposing legal consequences of future actions. BLACK'S LAW DICTIONARY 463 (2d ed. 1910). One "exempt" from a legal requirement has no obligation to abide by it; failure to do so gives rise to no rights in or liabilities to others. "Releases" were legal instruments commonly used at then, as now, to "giv[e] up [] a right, claim, or privilege . . ." and were recognized as being fundamentally different from "exemptions." *Id.* at 1011. Section 5 did *not* address "releases."

Section 5 was aimed at what was said to be the practice of railroads a century ago, when FELA was enacted, to obtain "exemptions" by "insist[ing] on a contract with their employees[] discharging the company from liability for personal injuries." H.R. Rep. No. 60-1386 at 6 (1908). As the Court stated in *Callen*: "It is obvious that a release is not a device to exempt from liability. . . ." 332 U.S. at 631. Releases that "recogniz[e the] possibility" of liability are not proscribed "exemptions." *Id.* Congress did *not* say that rail-

road employees may not settle and release actual or potential claims arising out of their employment by agreement with their employer and without litigation where, as here, "controversies exist as to whether there is liability. . . ." *Id.* at 631. The uncertainty about liability for asbestos-related injuries, due to the absence of asbestos-related injury test results, did not bar settlement of that potential liability with a valid release.

Moreover, neither respondent nor any of the decisions he cites has identified any language in § 5 that sanctions the extensive regulatory rules adopted by either the "known claim" courts or the "known risk" courts, especially those that display a bias against what they term "boilerplate" or "laundry list" release provisions. The sole operative term in § 5—"exempt"—simply will not bear that heavy weight, especially if considered in light of the legal lay of the land when Congress chose to use that term in 1908.[2] No court has identified any reason to believe that that the 60th Congress would have intended, by precluding prospective "exemptions" from liability, a departure from the then prevalent freedom of parties to contract, to include agreements to

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[2] The initial version of FELA, enacted in 1906, had been invalidated by a divided Court in the *Employers' Liability Cases*, 207 U.S. 463 (1908). While the present FELA was later upheld (*Second Employers' Liability Cases*, 223 U.S. 1 (1912)), Congress must be understood to have proceeded cautiously in the second FELA as to possible interference with the liberty of contract that divided the Court.

In *Philadelphia, B. & Wash. R.R. v. Schubert*, 224 U.S. 603, 612-13 (1912) (cited in Opp. at 3), the provision at issue related to an "employee relief fund" pre-dating any injury or claim. It provided that action under FELA would suspend benefits, that any compromise of the claim would preclude any claim on the fund, and that acceptance of benefits from the fund would release and satisfy all claims. *Id.* at 606-07. The Court held that both versions of FELA recognized benefits under relief funds, and such immunity provisions were barred by § 5. *Id.* at 611-13. It did not address whether a release was a prohibited "exemption."

release potential claims. Nor has respondent. *Cf. Coppage v. Kansas*, 236 U.S. 1 (1915).[3]

Nor does *Callen* support respondent's distinction, which relies heavily on *Callen*'s ruling that "[w]here controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." 322 U.S. at 631; *see* Opp. at 10. Respondent appears to infer that only "controversies" that are ripe in an Article III sense and known to the parties, and not known risks arising from past occurrences that may give rise to ripe claims in due course, may be settled. *Id.* But there is simply no basis for such an inference.

At issue here is a genuine settlement release, prompted by respondent's claims based on actions and events prior to the release that could give rise to future liability to respondent. It was not a sham "exemption" or "device to exempt from liability," *Callen*, 332 U.S. at 631. The release respondent signed concerned liability for present or future results of events that had already occurred in the course of his employment—including his alleged pre-release asbestos exposure, which is what is at issue in this case. It did not purport, nor is it invoked here, to "exempt" the railroad from liability from future employment activity. If the plain language of § 5 is followed, it is not an invalid "exemption," but a release that "stand[s] on the same basis as the releases of [non-FELA claims]." *Id.* at 630.

II. THE DECISION BELOW CONFLICTS WITH THE 3RD AND 11TH CIRCUITS' DECISIONS

Respondent recognizes a "disagreement" between the Sixth and Third Circuits: the Sixth Circuit opted in *Babbitt* for a

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[3] *See generally* Epstein, *Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire*, in THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed. 1999); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

"known claim" test which the Third Circuit in *Wicker* rejected in favor of a "known risk" test, a rejection echoed by the Eleventh Circuit in *Sea-Land*. Opp. at 7.[4] Respondent claims, wrongly, however, that the circuit split "is of no consequence here." Opp. at 5.

First, he seeks to minimize the tension between *Wicker*'s complex "known risk" approach and *Sea-Land*'s simpler statement of a "known risk" test. *See* Opp. at 4-5. But the two cases reached opposite results—the release in *Sea-Land* was upheld—and *Sea-Land* contains none of *Wicker's* language "disfavor[ing] broad releases," Opp. at 8, and none of its complex quasi-regulatory requirements, Opp. at 4, upon which he relies.

Second, respondent asserts that the decision below can be reconciled with the "known risk" test because this case involves "'the dreaded "laundry list" general release, disfavored by both *Babbitt* and *Wicker*.'" Opp. at 6 (quoting Pet. App. 15a). However, he fails to address the demonstration (Pet. at 19-22) that (1) the court below went beyond *Wicker* in effectively adopting a *per se* prohibition of broad general releases and applying it even in a case in which the risk at issue was specifically contemplated and discussed by the parties at the time of the release; (2) a rule against broad general releases cannot be squared with *Callen* and *Sea-Land*; and (3) such a rule makes no sense as a matter of congressional intent or policy.

Respondent does *not* deny that the risk at issue here was a "known risk." He concedes "attend[ing] an asbestos screening the month before signing the release," and discussing "asbestos claims that might later accrue" during the negotiation of the release. Opp. at 1-2. He would not have done these things if he did not know or believe that past occupa-

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[4] Respondent notes that *Sea-Land* agreed with *Wicker* that FELA release cases are "fact-driven." Opp. at 5. However, the question presented in this case concerns the standard under which the facts are to be assessed.

tional exposure placed him at risk of asbestos-related injury. He muddles the issue by claiming that the Mississippi Supreme Court made a "finding" that there was "no evidence" that he was "aware that he had a potential asbestos-related ***injury***." *Id.* at 6 n.1 (emphasis added). Like this and other appellate courts, that court neither made nor purported to make a factual finding. He cites no such finding by the trial court. And, the statement addressed the "known injury" test, not the "known risk" test.[5]

In sum, neither respondent nor the courts below have denied, or could deny, that he knew of the risk of asbestos-related injury. Hence, the decision below is irreconcilable with a "known risk" test. Any defense of it must be based on the minority "known injury" test, or on a novel, absolute prohibition on "broad, general releases."

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND THIS CASE, ALONG WITH *ACUFF*, ARE SUITABLE VEHICLES FOR RESOLVING THEM

Respondent asserts that the second question presented, addressed to the circuit split, "affects few cases." Opp. at 7. But he incorrectly re-defines that split as limited to cases that do "not involve a 'laundry list' release." *Id.* at 8 n.3. Broad, general releases that list multiple risks—the kind involved in this case and that respondent disparages as "'laundry list' releases"—are used often because of their economic value to all involved. They have been widely used in reliance on the understanding, informed by *Callen* and basic contract law principles, that nothing in § 5 prohibits the mutual gains by trade they enable. *See* Pet. at 19-22.[6] Contrary to respon-

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[5] Also, the statement appears in the court's discussion of "known injury," Pet. App. 13a, not of the *Wicker* test, Pet. App. 14a.

[6] The Mississippi Supreme Court's antipathy to "laundry list" releases suggests that it might have upheld the release here if only the release were

dent's assertions, those releases *are* implicated both by *Callen*'s validation of releases of FELA claims "on the same basis as the releases of others," 332 U.S. at 630, and by the schism between the "known injury" and "known risk" tests. Even *Wicker* calls for a "fact-intensive" inquiry into intent, in which the fact that listed risks are "specifically known" is just one factor. *See* 142 F.3d at 701; Pet. at 19-20. Respondent and the court below apparently insist that a "'laundry list'" cannot "manifest[] both parties' intent to release claims related to the specified risks." Opp. at 8; *see* Pet. App. 15a, ¶ 29.[7]

Even if the significance of the questions presented were evaluated solely by reference to appellate decisions, on which respondent focuses solely, there is here a divergence from *Callen* and an acknowledged circuit split that since 1998 has deepened, now including as many as four different standards (the Sixth Circuit's "known injury" standard; the Eleventh Circuit's simple "known risk" standard; the Third Circuit's complex, "fact-intensive" "known risk" standard, and now the Mississippi Supreme Court's "known claim" or "known risk" standard with an apparent *per se* prohibition on multiple risk ("laundry list") releases). The questions presented also implicate multiple intermediate appellate decisions, and are

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limited to asbestos-related risks. Yet respondent, the courts below, and the other courts invalidating releases have identified no reason why the inclusion of releases of other types of claim should be dispositive, and respondent's proposed "in 'controversy'" requirement would invalidate even an asbestos-only release here until respondent got test results and put a claim "in 'controversy.'"

[7] Insofar as *Wicker* requires a "fact-intensive" inquiry into intent going beyond the intent expressed in language of the releases, it should lead in this case to a remand for a factual investigation of the dispute between the parties as to what was said in negotiations about the specific issue of the release's effect on respondent's potential asbestos claims. Respondent says he was told the release would not, despite its plain language, affect those claims, *see* Opp. at 1-2; petitioner's witness who negotiated the release with him testified to the contrary. *See* Pet. at 2 n.1.

raised by the pending petition as to twelve further plaintiffs in No. 06-971 (*Ill. Cent. R.R. v. Acuff*). More importantly, however, respondent's narrow appellate focus ignores that the greatest impact of the uncertainties is felt in the context of settlements, which are typically far more numerous than actual, visible lawsuits.[8] Indeed, he wholly ignores the need for guidance not only to courts in deciding cases, but to FELA employers and employees seeking to resolve FELA claims.

Finally, respondent suggests that this case is a "poor vehicle" for assessing the questions presented. Opp. at 5. But again, his argument against *certiorari* assumes the validity of his merits argument that the decision below is consistent with *Callen* and with the "known risk" test. Because the court below invalidated an express and specific release of a "known risk" of injury from past occurrences, *see Wicker*, 142 F.3d at 701; *Sea-Land*, 231 F.3d at 852, which was not a "device to exempt" petitioner as to future occurrences, *see Callen*, 332 U.S. at 631, this case squarely raises the questions presented.

The Court may wish to consider this petition in conjunction with the pending petition in *Acuff*, which presents the same questions with respect to three additional formulations of release terms.

The Court should grant the petition for *certiorari*.

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[8] Respondent contends that the denials of certiorari in *Wicker* and *Anderson v. A.C. & S., Inc.*, 797 N.E.2d 537 (Ohio Ct. App. 2003), *appeal not allowed*, 804 N.E.2d 40 (Ohio 2004), *cert. denied*, 543 U.S. 926 (2004), mean the questions presented have already been deemed uncertworthy. Opp. at 9. *Contra, e.g., Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (unexplained denials of *certiorari* have no precedential value). As of the *Wicker* denial, a year after *Babbitt*, there had been insufficient time for the issue to percolate; the later decisions have shown that the conflict is deepening. *Anderson* was an intermediate state appellate court ruling, which the state supreme court declined to review and this Court rarely reviews.

Respectfully submitted,

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